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No.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD D. McVICAR, WARDEN,

Petitioner,

v.

LEE OTIS GRIFFIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. §2254(d). This petition presents the following question concerning the Act and amended §2254(d):

If the court of appeals correctly concluded in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), that amended §2254(d) applies to cases pending on the date of enactment and bars relief on constitutional claims decided by a state court, unless the petitioner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then whether the court of appeals correctly refused to apply amended §2254(d), having found that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act?

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Petitioner Richard McVicar, Warden, respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the grant of habeas corpus relief.

OPINIONS BELOW

The May 14, 1984, decision of the Illinois Appellate Court, affirming Respondent Griffin's conviction, is published at 124 Ill. App. 3d 119, 463 N.E.2d 1055 (5th Dist. 1984). The May 14, 1984, decision of the Illinois Appellate Court, reversing the denial of post-conviction relief, is published at 124 Ill. App. 3d 169, 463 N.E.2d 1063 (5th Dist. 1984). The December 20, 1985, decision of the Illinois Supreme Court, reversing the State appellate court's decision with respect to post-conviction relief, is published at 109 Ill. 2d 293, 487 N.E.2d 599 (1985). The September 23, 1993, decision of the United States District Court for the Southern District of Illinois, denying habeas corpus relief, is unpublished. The November 14, 1994, decision of the United States Court of Appeals for the Seventh Circuit, remanding the case back to the district court, is reported at 40 F. 3d 170 (7th Cir. 1994). The May 3, 1995, decision of the district court, granting habeas corpus relief, is unpublished and reprinted in the appendix to this petition. The May 21, 1996, decision of the Seventh Circuit is published at 84 F. 3d 880 (7th Cir. 1996), and reprinted in the appendix to this petition.

JURISDICTION

The court of appeals issued an opinion affirming the district court's granting of the writ of habeas corpus on May 21, 1996. Petitioner filed a petition for rehearing with suggestion for rehearing *en banc* on June 4, 1996. On September 23, 1996, the court of appeals denied that petition. (App. 29). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

THE STATUTORY PROVISION AT ISSUE

This case puts in issue §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

A. Statement of Facts

Respondent Lee Griffin, along with co-defendant Jimmy Lee Smith, was convicted in June of 1981 of the shooting murders of Charles Sims, Christi Smith and Ronald Walker and of the serious wounding of Charles Kellick. Three men were identified by witnesses as having been involved in the shootings—Lee Griffin, Jimmy Lee Smith and Will Hudson, who was never apprehended. (App. 2). Griffin was initially represented by attorney Ralph Derango. He apparently told Derango that although he had walked in during the shooting, he had not been involved. (App. 2). On this basis, Derango approached the police and attempted to negotiate a deal for Griffin. Derango's negotiation offers were rejected and, Griffin's family retained another attorney, Marvin Goldenhersh, to represent Griffin. (App. 2). Goldenhersh was also retained by Griffin's family to represent Jimmy Smith. (App. 2).

Goldenhersh moved to sever the trials of the two defendants on grounds that Jimmy Smith's extensive criminal record might prejudice Griffin and that either could have made admissions which could prove damaging to the other. (App. 2-3). The motion to sever was denied.

When questioned by the trial judge, Goldenhersh assured him that there was no conflict of interest in his joint representation of Griffin and Smith. (App. 3). The issue was raised a second time by the prosecutor just prior to trial. (App. 3). The case, however, proceeded to trial without further inquiry into the matter.

Griffin's conviction was affirmed on direct appeal. *People v. Griffin*, 124 Ill. App. 3d 119, 463 N.E.2d 1055

(5th Dist. 1984). He also filed a series of post-conviction petitions in state court. The proceedings relevant to this petition are summarized below.

In 1982, Griffin filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act in which he alleged that he had told his trial counsel, Marvin Goldenhersh, that he arrived at the crime scene after "the argument had started," but had not taken part in the shootings as had his co-defendant Jimmy Smith. (C. 261-63). Griffin further alleged that Goldenhersh, who he claimed was already representing Smith when he retained him, advised him that if he admitted he was at the crime scene, he would be found guilty on an accountability theory. (C. 264). According to Griffin, he thought this advice over and, after discussing it with Smith who could not testify because of his criminal record, decided to make up an alibi for the two of them. (C. 252). On cross-examination, Griffin admitted that Goldenhersh never advised him to come up with the alibi. (C. 267).

In his ruling, the post-conviction judge stated that he did not know whether Griffin was telling the truth or not, but that notwithstanding, he felt Griffin had been afforded a defense according to his own testimony under oath, and that the defendants had not presented antagonistic defenses. (C. 280-81).

The state appellate court reversed the circuit court's denial of the post-conviction petition. *People v. Griffin*, 124 Ill. App. 3d 169, 463 N.E.2d 1063 (5th Dist. 1984). Noting that "it may be unlikely" that Griffin repeated to Goldenhersh the innocent bystander story he told his first attorney, a majority of the panel found that nothing in the record indicated that Goldenhersh was provided

any fact inconsistent with the alibi defense. 124 Ill. App. 3d at 179, 463 N.E.2d at 1070. Nonetheless, the majority found that a conflict had manifested itself during trial when State witnesses were inconsistent in the details concerning Griffin's presence at the crime scene and involvement in the shootings, but not as to Smith's. The court reasoned that Goldenhersh was unable to stress this without harming Smith's interests. 124 Ill. App. 3d at 181, 463 N.E.2d at 1071-72.

The Illinois Supreme Court allowed the State's petition for leave to appeal and reversed the appellate court, finding that the trial court's findings in connection with the post-conviction petition should not have been disturbed. *People v. Griffin*, 109 Ill. 2d 293, 487 N.E.2d 599 (1985). The state high court rejected Griffin's contention that an actual conflict of interest developed when his trial lawyer told him that he could be found guilty on an accountability theory if he admitted to being at the crime scene, even if he had not actually been involved in the shootings. The court found that no actual conflict was apparent from the record because Griffin testified to a common alibi for himself and Smith, and it refused to credit Griffin's assertion that he had even told Goldenhersh the "present but innocent" story, finding it more likely that when Griffin fired his first lawyer who was attempting to negotiate a deal on the basis of the "innocent bystander" theory, he simply abandoned that theory in favor of the alibi defense. 109 Ill. 2d at 303, 304, 487 N.E.2d at 603.

Griffin later filed a second post-conviction petition, alleging that State witness Charles Kellick had perjured himself, that the State had knowingly used the perjured testimony, and that the State had systematically exclud-

ed all black jurors from the jury. At the hearing on this petition, Griffin testified that his first attorney, Mr. Derango, had initially tried to negotiate a lesser charge with the chief officer investigating the case. (Transcript from hearing at 42-43). Griffin also testified that the officer went to his family's home and told them he had spoken to the attorney, but that he "wasn't going for" the offers. (Transcript from hearing at 43). According to Griffin, "[t]his frightened me and it frightened my family and Mr. Derango was released from representing me . . . ." (*Id.*) After previously testifying at the hearing on his first post-conviction petition that Goldenhersh had not advised him to come up with an alibi, Griffin this time testified that after firing Derango, he hired Goldenhersh who instructed him to testify a certain way at trial. (*Id.*). This post-conviction petition was denied but never appealed.

In 1991, Griffin filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois. In the petition, he alleged that an actual conflict of interest existed in that Goldenhersh undertook representation, knowing that Griffin's first attorney had initiated plea negotiations and, instead of continuing those negotiations which he now contended were "ongoing," Goldenhersh, after being told by Griffin that he had not been involved in the shootings but had been at the crime scene, erroneously advised him that he would be found guilty on an accountability theory if he even admitted to just being at the scene. During the habeas proceedings, Griffin's counsel deposed Goldenhersh, whose recollection on many details was sketchy after 11 years. Goldenhersh did persist, however, in maintaining that he was first retained by Griffin's family

for Griffin himself, and that Griffin had insisted that the alibi which he testified to at trial was the truth. (Deposition at 26, 29). He also thought that he had discussed the issue of accountability with Griffin, but unequivocally asserted that he would not have told Griffin or "anybody else" that simply admitting presence at the crime scene would result in a guilty verdict based on accountability. (Deposition at 23-24).

After an evidentiary hearing at which Griffin testified, the magistrate judge entered an order denying the petition and made the following findings of fact:

> It is unquestioned that when first apprehended and while represented by attorney Ralph Derango, the petitioner attempted to strike a bargain with the East St. Louis detectives. In making this offer, the petitioner claimed he was at the scene of the crimes but did not participate and knew the identity of the killer. This offer was not acted upon since the detectives had already developed information which put the petitioner at the scene and allegedly shooting one of the victims. Thereupon, Mr. Derango was discharged as counsel and Marvin Goldenhersh was retained to represent the petitioner and his co-defendant.
>
> After being retained, Mr. Goldenhersh interviewed the petitioner and his co-defendant. During the interview, the facts pertaining to an alibi defense were given to Marvin Goldenhersh as the petitioner's attorney. In his deposition, Marvin Goldenhersh stated that only facts relating to the alibi defense were given to him while preparing for trial. Mr. Goldenhersh further stated that he never discussed the theory of accountability with the petitioner and did not tell him that he would be found guilty if he admitted being at the scene. In his video deposition,

> Mr. Goldenhersh denied that the petitioner had given him any facts which would have suggested his presence at the crime scene or which would have suggested an antagonistic defense. Accordingly, at trial, Mr. Goldenhersh presented the alibi defense and, consistent with that defense, cross-examined witnesses in support of that theory.

(September 23, 1993 opinion at 10-11).

Upon Griffin's appeal to the court of appeals, the case was remanded back to the district court with instructions for "a more searching examination of the record consistent with [this Court's] opinion." *Griffin v. Camp*, 40 F. 3d 170, 174 (7th Cir. 1994).

On remand, the magistrate judge this time granted the petition for a writ of habeas corpus. Finding that Griffin had "a viable alternate defense available," the magistrate judge concluded that only Jimmy Smith would have benefitted from an alibi defense, and "[o]nly by presenting the alibi defense could counsel have represented both clients." (App. 41). The judge concluded that the existence of an innocent bystander defense for Griffin made his position antagonistic to Jimmy Smith's and, consequently, found that a conflict of interest existed between Griffin and Smith. (App. 41-42).

B. The Proceedings Below

In its May 21, 1996, opinion affirming the grant of habeas relief, the majority of the three-judge panel below relied on three Seventh Circuit cases: *United States ex rel. Cole v. Lane*, 752 F.2d 1210 (7th Cir. 1985), *United States v. Cirrincione*, 780 F. 2d 620 (7th Cir. 1985), and *Gray v. Director, Department of Corrections*, 721 F.2d 586

(7th Cir. 1983). After correctly citing the standards set forth in *Cole*, *Gray*, and *Cirrincione*, the majority appeared to combine the standards from those three cases in fashioning is own rule for this particular case, *Teague*[1] considerations notwithstanding. More specifically, the majority effectively concluded that although a defendant, whose co-defendant is represented by the same attorney, fails to tell the attorney about the possible availability of an "unpromising" defense which could compromise the co-defendant's interest, but rather tells the attorney only about a "hopeless" defense he wishes to share with his co-defendant, with the information counsel receives from collateral sources concerning the possible availability of the "unpromising" defense, counsel is under a duty not only to discuss with the defendant "the disadvantages of linking his fortunes" to those of his co-defendant, but to perhaps outright refuse to present the "hopeless" defense on the defendant's behalf. In the dissent, on the other hand, Judge Flaum concluded that under not only Seventh Circuit case law, but more importantly, this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the defendant must establish more than merely a potential conflict of interest, and that, Griffin did not do.

On May 29, 1996, Griffin filed a motion for bond pending the court of appeals' issuance of the mandate and, on June 4, 1996, the Petitioner filed a petition for rehearing with suggestion for rehearing *en banc*. On July 19, 1996, the court of appeals issued an order deferring its ruling on Griffin's bond motion pending a merits decision in *Lindh v. Murphy*, a §2254 case arising out of Wisconsin,

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[1] *Teague v. Lane*, 489 U.S. 288 (1989).

reargued *en banc* on June 17, 1996, which raised issues concerning the construction of the new Antiterrorism and Effective Death Penalty Act of 1996.

On September 12, 1996, the court of appeals issued its merits decision in *Lindh v. Murphy*, 96 F. 3d 856 (7th Cir. 1996 (*en banc*). In *Lindh*, the court held, among other things, that §2254(d), as amended by the Antiterrorism Act, applies to cases that were pending on the date of enactment and bars relief on constitutional claims adjudicated in state court, unless the prisoner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion. 96 F. 3d at 867, 869, 876.

On September 23, 1996, only 11 days after *Lindh* was decided, Petitioner filed a letter pursuant to Circuit Rule 28(j), citing as additional authority the court of appeals' decision in *Lindh*. Entered on the same day was an order from the court denying Petitioner's petition for rehearing with suggestion for rehearing *en banc*. The order further stated that the court's May 21 opinion had been amended by inserting the following as footnote 11:

> The State has not argued in its petition for rehearing that this case is affected by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Antiterrorism Act), which amends the procedures and standards applicable to petitions for writs of habeas corpus. In *Lindh v. Murphy*, No. 95-3608, issued September 12, 1996, this court en banc considered and decided a number of issues involving the application of the Antiterrorism Act. Among other things, we decided that a state may waive the benefits of the amended 28 U.S.C. § 2254(d) (slip op. at

> 13). That being the case here, we need not further consider the application of the Antiterrorism Act.

(App. 30).

On September 25, 1996, when Petitioner discovered that the court of appeals had issued an order finding that the State had waived the benefits of § 2254(d), it filed a motion to vacate that portion of the court's order. On October 3, 1996, the court of appeals denied Petitioner's motion, with Judge Flaum dissenting.

On October 4, 1996, Petitioner filed an emergency motion with the court of appeals asking it to recall the mandate, which had issued on September 27, 1996, in order that a petition for writ of certiorari could be filed with this Court. On October 7, 1996, the court of appeals denied the motion, again with Judge Flaum dissenting. At that point, Petitioner filed with Justice Stevens an emergency application to recall the court of appeals' mandate pending the filing of a petition for certiorari. Justice Stevens denied the application, and Petitioner refiled the same, this time addressing it to the Chief Justice. This Court entered an order on October 15, 1996, denying Petitioner's application, No. 254.

On October 8, 1996, the district court released Griffin on unsecured bond. He remains free today. The State has until January 18, 1997, to decide whether to retry him.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' FINDING THAT THE STATE WAIVED THE BENEFITS OF AMENDED 28 U.S.C. §2254(d) IS NOT CONSISTENT WITH THIS COURT'S DECISIONS IN *SUMNER v. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY*

A. If the Court of Appeals Was Correct With Respect To Its Holdings in Connection With Amended §2254(d) in *Lindh v. Murphy*, Then the Court Erred in Not Applying the Provision To the Case at Bar.

If this Court finds that the court of appeals was in fact correct in *Lindh*, where it held that amended §2254(d) applies to cases that were pending on the date of enactment and bars relief on constitutional claims adjudicated in state court unless the prisoner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then this Court must find that the court reached an incorrect decision when it refused to apply amended §2254(d) in the case at bar when it concluded that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act.

In holding in this case that the State could waive the benefits of §2254(d), the court of appeals relied on a portion of its decision in *Lindh*. There the court stated:

> We do not suggest that §2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. §2241; a state may waive the benefits of 28 U.S.C. §2254(d), although other provisions of the 1996 Act, such as the revised

> exhaustion requirement in §2254(b), suggest that counsel's inattention to niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. *See also Eaglin v. Welborn*, 57 F. 3d 496, 498-99 (7th Cir. 1995) (*en banc*) (holding that a court may decide a case on the basis of *Teague* even if the state's lawyers overlooked that possibility).

96 F. 3d at 865. *See also Watkins v. Meloy*, 95 F. 3d 4, 5-6 (7th Cir. 1996) and *Emerson v. Gramley*, 91 F. 3d 898, 899-900 (7th Cir. 1996) (both holding that the provisions of the new Act governing the scope of federal judicial review do not affect the subject-matter jurisdiction of the federal courts, and thus can be waived).

Petitioner respectfully submits that the court of appeals, in holding as it did, ignored this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), in which the Court reaffirmed its 1908 decision in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). In *Sumner*, then-Justice Rehnquist wrote:

> The dissent contends that any argument premised on § 2254(d) was 'abandoned' because petitioner raised his § 2254(d) argument before the District Court, but did not do so in his appellate brief. (citation omitted). Presumably, this contention does not mean to imply that petitioner conceded error with regard to the state-court factual determinations, but instead that he 'abandoned' his right to rely on § 2254(d) as a reason for *not* rejecting these factual determinations. (Emphasis in original). Whether or not the petitioner specifically directed the Court of Appeals' attention to § 2254(d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal court,' *Preiser v. Rodriguez*, 411 U.S. 475, 485, 93 D.Ct.

> 1827, 1833, 36 L.Ed.2d 439 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43 53 L.Ed. 2d 126 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." Having had the benefit of the full briefing and argument from the parties on the § 2254(d) issue, we are simply following the well-established doctrine of the *Mottley* case in deciding the § 2254(d) issue.

449 U.S. at 547 n. 2. *See also Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 n. 4 (1986).

Given this Court's finding in *Sumner*, the court of appeals was incorrect in holding that amended §2254(d) does not affect a federal court's subject-matter jurisdiction and can, therefore, be waived. Because the court decided an important question of federal law in a way that conflicts with relevant decisions of this Court, this Court should grant the petition for writ of certiorari.

B. Had the Court of Appeals Not Held that the State Waived the Benefits of Amended §2254(d) and Applied the Provision in this Case, the Result of its Opinion on the Merits Would Have Been Different.

Had the court of appeals not found that the State waived the benefits of amended §2254(d), but instead rightfully applied it in this case, pursuant to its own reasoning in *Lindh*, the result of Griffin's appeal would necessarily have been different. As the court of appeals held in *Lindh*, the prisoner "must be able to point to an authoritative decision of the Supreme Court in order to

secure a writ." 96 F. 3d at 869. The majority in the case at bar, however, relied instead on Seventh Circuit case law—*Cole*, *Gray*, and *Cirrincione*—in fashioning its own rule to justify granting the writ, while in the dissent, Judge Flaum correctly stated that under *Cuyler*, which requires more than the showing of a potential conflict of interest, Griffin could not win.

Using the court of appeals' own words from *Lindh*, 96 F. 3d at 876 (emphasis in original), the Illinois Supreme Court in this case determined "the *legally* correct question" under *Cuyler*, *i.e.*, whether evidence of an actual conflict was shown." *Griffin*, 109 Ill. 2d at 303, 487 N.E. 2d at 603.

Moreover, in applying that standard to the facts of the case, the Illinois court rendered a "responsible, thoughtful answer." *See Lindh*, 96 F. 3d at 871. The state high court found that no actual conflict was apparent from the record because Griffin testified to a common alibi for himself and Smith, and it refused to credit Griffin's assertion that he had told his trial counsel the "present but innocent" story, finding it more likely that when Griffin fired his first lawyer who was attempting to negotiate a deal on the basis of the "innocent bystander" theory, he simply abandoned that theory in favor of the alibi defense. 109 Ill. 2d at 303, 304, 487 N.E.2d at 603. The court also found that even if counsel had been made aware of the "innocent bystander" theory through collateral sources obtained during discovery, it could not be said that such information clearly placed Griffin and Smith in antagonistic positions for trial because the statements Griffin made to police during the investigation stage were ambiguous, not clear statements that he had not participated in the shootings or that Smith was

solely responsible for them. 109 Ill. 2d at 304-05, 487 N.E.2d 603-04. Finally, the state court found that the discrepancies between the testimony of two trial witnesses regarding the timing of Griffin's arrival at the crime scene, which Griffin claimed were not explored fully to his advantage, were attributable not to the fact that counsel was trying to help Smith at Griffin's expense, but perhaps because counsel was surprised by the witnesses' testimony since neither had testified before the grand jury, and also because counsel may have been "somewhat deflected" by the fact that Griffin was testifying that he and Smith were at a tavern at the time of the shootings and, consequently, felt that discrepancies as to what occurred at the crime scene were "irrelevant so far as that [the alibi] defense was concerned." 109 Ill. 2d at 306, 487 N.E.2d at 604. *See Burger v. Kemp*, 483 U.S. 776, 784-85 (1987) (finding that determining that there was an actual conflict of interest requires attributing counsel's motivation for a certain course of action to his or her divided loyalties).

To be sure, an actual conflict of interest, as opposed to merely a potential conflict of interest, is not easily discernable. However, as the court of appeals itself stated in *Lindh*, a "thoughtfully reasoned," "fact-specific" answer, such as the one the Illinois court rendered in this case, cannot be called unreasonable even if the federal court considers it to be "wrong." 96 F. 3d at 876-77. Accordingly, the court of appeals, had it properly applied §2254(d), should have deferred to the Illinois court's conclusion that, under the facts of this case, Griffin was not entitled to relief under the Sixth Amendment.

CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2330

LEE O. GRIFFIN,

Petitioner-Appellee,

v.

RICHARD D. MCVICAR, Warden,
Shawnee Correctional Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 91 C 228—**Gerald B. Cohn**, *Magistrate Judge.*

ARGUED JANUARY 12, 1996—DECIDED MAY 21, 1996

Before POSNER, *Chief Judge*, and CUDAHY and FLAUM, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Respondent, Warden McVicar, appeals the grant of petitioner Lee Griffin's habeas corpus petition. The district court granted the writ of habeas corpus on grounds of ineffective assistance of counsel due to an actual conflict of interest inhering in the joint representation of Griffin and a co-defendant, Jimmy Lee Smith, by Marvin Goldenhersh in a 1981 murder trial. We affirm.

I. Introduction

Lee Griffin and Jimmy Lee Smith were convicted in June 1981 of the shooting murder of Charles Sims, Christi Smith and Ronald Walker and of the serious wounding of Charles Kellick. The shootings occurred on February 5, 1981, in the apartment which Smith and Walker shared. Three men were identified by witnesses as having been involved in the shootings—Lee Griffin, Jimmy Lee Smith and Will Hudson, who apparently was never apprehended. Griffin was initially represented by attorney Ralph Derango. He told Derango that, though he had walked in during the shooting episode, he had not been involved in the shootings but was merely an innocent bystander who had, in fact, tried to stop the shooting. On this basis, Derango approached police officer L. C. Moore and attempted to negotiate a deal for Griffin in exchange for his testimony against Smith. Derango's overtures were apparently not well-received by the State and, perhaps for that reason, Griffin's family retained Marvin Goldenhersh in Derango's place approximately three weeks after Griffin's arrest. The state court opinions in this case indicate that Mr. Goldenhersh was already representing Jimmy Smith at that time.[1] *People v. Griffin*, 463 N.E.2d 1063, 1065 (Ill. App. 5 Dist. 1984); *People v. Griffin*, 487 N.E.2d 599, 602 (Ill. 1985).

Mr. Goldenhersh moved to sever the trials of the two defendants on grounds that Jimmy Smith's extensive criminal record might prejudice Griffin and that either defendant might have made admissions which could prove dam-

[1] Mr. Goldenhersh disputes this fact in his deposition, taken in connection with this habeas petition. There he claims that he undertook representation of Griffin prior to taking on the representation of Jimmy Smith. Since no one suggests that Mr. Goldenhersh *intentionally* gave preference to the representation of Smith over the representation of Griffin, the order in which he took on their cases is not of any material significance to the resolution of this appeal.

aging to the other.[2] In arguing the motion Mr. Goldenhersh specifically cited examples of admissions made by Griffin. The motion to sever was denied.

The potential for conflict of interest in the joint representation of Griffin and Jimmy Smith was raised at least twice prior to trial, although not by Mr. Goldenhersh. When questioned by the judge prior to trial, Mr. Goldenhersh asserted that there was no conflict in his joint representation. Then, during the hearing of motions just prior to trial, the State, apparently concerned about the potential for reversal on appeal, raised the issue of potential conflicts:

> Mr. Hamilton [State's Attorney]: The second question which I think we should deal with is whether these defenses, these defendants' defenses will become, if they are not now, antagonistic to each other at some point in the trial. Now Mr. Goldenhersh has represented both of these defendants for some time. He has access to the Discovery provided by the State's Attorney's Office. He has talked with both of these defendants, and I don't think he should be permitted to just juggle strategic weapons, if [sic] I'm not trying to suggest that there is anything improper into his continued representation of both defendants, but if he now knows that such a conflict may develop, perhaps there is a question of whether he can continue to represent both the parties. . . .

Trial Tr. at 12.

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[2] Mr. Goldenhersh recalls in his deposition that the primary grounds for the motion to sever was the potential prejudice to Griffin from Smith's criminal record and that "anything else that [he] threw into the motion would have been incidental." Resp. App. Exh. F at 32. This recollection is contradicted by the severance hearing transcript which shows that the possibility of damaging admissions was a substantial basis for the motion. Pet. App. Exh. E. Indeed, the discussion during that hearing focused almost entirely on potential prejudice due to damaging admissions.

Neither Mr. Goldenhersh nor the trial judge responded to this point and the case proceeded to trial without further inquiry into the matter.

II. The Trial

A. The Evidence

The eyewitness testimony, taken as a whole, established that three men, other than the victims, were in the apartment during the period in which the shootings occurred. Christi Smith was already in the apartment with one of these men when Sims and Kellick, who had come by to visit Christi and were outside the apartment, heard her crying. When she did not answer the door, they went in to investigate. Velma Robinson, who had come with Sims and Kellick, remained outside in Kellick's truck while they went in. Velma saw two more men get out of a red and white Cadillac and enter the apartment after Sims and Kellick had gone in.

When Sims and Kellick entered the apartment looking for her, Christi Smith was in the bathroom with one of the other three men. The two men whom Robinson had seen enter came up behind Sims and Kellick. At this point, Sims was shot by the man in the bathroom, according to Kellick. Kellick turned to run and he was shot twice—once in the back of the head and once in the face after he fell. At some point after the three men left, Kellick managed to crawl out of the apartment and hide in a basement or crawl space under the stairs.

Next, Robinson saw the same two men she had observed entering leave the apartment and drive away. A few minutes later Walker returned home and went into the building. Shortly after that, the two men in the Cadillac returned, got out of the car and went into the building as well. Robinson heard another shot, at which time she drove away in search of police. Though Walker was shot five times, he managed to make his way to a nearby convenience store where he spoke to several police officers. He

died shortly thereafter, having been taken by ambulance to a hospital.

The key issues at trial were the identification of the three men and of the role each had played. Smith was identified as a shooter by the testimony of Kellick and of three witnesses who testified as to the dying declarations of Walker. Kellick testified that Jimmy Smith shot him in the face and kicked him after he was felled by a shot from behind as he tried to run away. Three witnesses testified to having heard Walker's dying declarations in the convenience store. Police officer Settles, state trooper Rice and store manager David Winchester each testified that he heard Walker say that Jimmy Smith shot his girlfriend (Christi Smith).

While this testimony consistently implicated Smith, there were significant contradictions in the testimony implicating Griffin in the shootings. Kellick testified that Griffin was the first man in the apartment and was in the bathroom with Christi Smith when Kellick arrived. Thus, Kellick testified, it was Griffin who shot Sims. Kellick did not identify Griffin immediately, however. He was hospitalized after the shootings due to his serious injuries. A police officer testified that at the hospital in the hours just after the shootings Kellick told him that he didn't know who had done the shooting. Tr. at 337. Kellick testified that he did not remember talking to police during the first few days after the incident. Kellick later identified Griffin from a videotaped lineup several days after the shooting. He testified that he recognized Griffin from having seen him on two prior occasions.

Robinson, in direct contradiction of Kellick's testimony, identified Griffin as one of the two men who emerged from the red and white Cadillac (later shown to be Griffin's) and entered the apartment *after* Sims and Kellick.

Police officer Settles testified that Walker said that "Lee" shot him. State trooper Darrell Rice, however, testified that Walker said that *Lee's friend* shot him. Winchester had not heard Walker say who had shot him.

In sum, while Kellick's unrefuted testimony identified Jimmy Smith as his assailant and all three witnesses to Walker's dying declaration reported his identifying Jimmy Smith as Christi Smith's assailant, only two witnesses, Kellick and Settles, gave testimony suggesting that Griffin had shot anyone. The testimony of each of these latter two witnesses was directly contradicted by other testimony. Thus, the identification evidence against Jimmy Smith was much stronger than the evidence against Griffin.

B. The Theory of Defense

At trial, Griffin and Smith were both represented by Mr. Goldenhersh. The two defendants presented a joint alibi defense, consisting of Griffin's testimony that he and Smith had been at a local tavern playing cards at the time of the murders. The alibi was supported to some extent by the testimony of a witness, Priscilla Smith,[3] that she had loaned Griffin five dollars and danced with him at the tavern. Priscilla Smith placed the defendants at the tavern between 4:30 and 5:00 p.m. and again at sometime after 6 p.m. and said that she did not see them there after about 6:30 p.m. The shootings apparently took place sometime between 5 p.m. and 6:30 p.m., when Walker showed up at the convenience store.

The alibi story was presented through Griffin's and Priscilla Smith's testimony. However, Mr. Goldenhersh's major trial strategy was apparently to discredit the eyewitness identifications of Griffin and Jimmy Smith. Indeed, Mr. Goldenhersh did not even mention the alibi in either his opening or closing argument. Mr. Goldenhersh's efforts to discredit the eyewitness testimony were organized around a theory that the shootings were linked to the drug-related killing of Griffin's brother, which had oc-

[3] As far as we can ascertain from the record, Jimmy Smith, Christi Smith, Priscilla Smith and another witness, Betty Smith, are not related to one another.

curred just a few weeks earlier.[4] In his opening statement, for example, Mr. Goldenhersh said that the evidence would show that Sims and Kellick "after killing the brother of Griffin, . . . then have set up and plotted, plainly set up and plotted to make his brother, Lee Griffin, and Jimmy Smith the scapegoats of this dope-related killing." Tr. at 159. To this end, Mr. Goldenhersh repeatedly tried to elicit detailed testimony about the drug involvement of the victims and to connect them to Griffin's dead brother. The State resisted these attempts, stating in a portion of the proceedings held away from the presence of the jury that "[a]t best, all that Mr. Goldenhersh's offer of proof does is provide speculation as to motive, and provide a motive for particularly defendant Griffin to have committed the offenses named in the indictment." Tr. at 454. The trial court sustained the State's objections to questioning along these lines, finding such questions irrelevant to the identification issues at hand. Mr. Goldenhersh, however, continued to pursue the scapegoat theory in his closing arguments, pointing out the time which passed after the shootings before either Kellick or Robinson identified the defendants and arguing that Kellick and Robinson were participating in a "cover-up." Mr. Goldenhersh discussed at length the fact that Sims had one thousand dollars with him when he went to Christi Smith's house and insinuated that the police investigation was not thorough and that "there couldn't be all this dope and one thing and another without some police involvement." Tr. at 499.

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[4] Any connection between Griffin's brother and Sims was evidenced only by Moore's hearsay grand jury testimony that he had received an anonymous phone call connecting the two. The story was presented to the grand jury to suggest that Sims was at least indirectly responsible for the death of Griffin's brother, thereby providing a motive for Griffin to shoot Sims. The prosecution apparently abandoned this theory and the speculation about a connection between the killings came in at trial only through Mr. Goldenhersh's opening, Tr. at 158-59, and closing, Tr. at 498, arguments and his attempts to question Officer Moore about a possible connection. Tr. at 348-49.

III. History of the Ineffective Assistance Claim

A. State Court History

Griffin has pursued the ineffective assistance claim which is the subject of this appeal through numerous state court proceedings. Griffin first presented the claim in his direct appeal of his conviction. In that appeal, Griffin relied on Mr. Goldenhersh's failure to present a non-participating bystander defense as grounds for the ineffective assistance claim. Griffin Direct App. Br. He noted that Mr. Goldenhersh was aware that Griffin had made statements to the police indicating that he had been present at the scene and knew who had done the shooting, but that Mr. Goldenhersh, in spite of this, still did not pursue an innocent-bystander defense.

In addition, Griffin argued that the joint representation left Mr. Goldenhersh completely unable, without compromising his representation of Smith, to impress upon the jury that the eyewitness testimony was much less conclusive with respect to Griffin than it was with respect to Smith. Instead, Mr. Goldenhersh was forced to attempt to discredit completely the testimony of these witnesses, including testimony, such as that of Trooper Rice. Rice reported Walker as saying that it was "Lee's friend" who shot him. Of the same ilk was the testimony of Robinson that Griffin was not in the apartment when Kellick and Sims entered. This evidence would have tended to exonerate Griffin at Smith's expense.

Griffin pointed out on direct appeal that Mr. Goldenhersh not only failed to pursue lines of inquiry which would have aided him at Smith's expense, but actively pursued a defense strategy which was highly prejudicial to Griffin alone. By presenting the scapegoat theory, Griffin argued, Mr. Goldenhersh "succeed[ed] in [his] opening statement in giving the jury a motive for Griffin to kill the victims that the State would not have been able to elicit . . . [and in] taking a defendant with no record and involving him by implication in dope traffic and a 'dope-involved killing'." Griffin Direct Appeal Br. at 13.

Finally, Griffin pointed out various other shortcomings in Mr. Goldenhersh's representation, such as his attack on the morals of the victims on grounds of "drugs and inter-racial sex"; his suggestion that Kellick was involved in a cover-up when after being shot in the head he took three days to identify the perpetrators; Mr. Goldenhersh's complete failure to present any evidence in support of his scapegoat theory; and his failure to object to various bits of damaging argument such as the State's Attorney's assertion that Walker identified Lee Griffin as his killer.

The Illinois Appellate Court, on May 14, 1984, ruled that the proposed alternative bystander defense was "too speculative to constitute the actual conflict required . . ." for ineffective assistance. The court noted that there was "nothing in the record to indicate that defendant Griffin presented his attorney with any facts other than those supportive of the alibi defense." Finally, the court stated that "[t]he failure of counsel to adopt a defense inconsistent with his client's testimony cannot reasonably be characterized as incompetent." *Griffin*, 463 N.E.2d at 1062.

While waiting for his appeal to be resolved, Griffin filed a state post-conviction petition. That petition was heard on October 12, 1982. In the hearing on that petition, Griffin testified that he had told both Derango and Mr. Goldenhersh that he had been present at the time of the attacks but that he had not shot anyone nor condoned the shooting. He stated that Mr. Goldenhersh had told him that if he said he was present he would be found guilty on an accountability theory. Griffin testified that he had lied at his trial when he stated that he and Smith were playing cards at the tavern while the shootings took place. He explained that he had lied because he believed that if he put himself at the scene of the crime he would be held accountable. Griffin also testified that Mr. Goldenhersh never talked to him about having his case tried separately from Smith's and that he and Smith and Mr. Goldenhersh had agreed that, because of Smith's prior record, Griffin would have to be the one to take the stand and testify to the alibi.

In the post-conviction proceeding, Griffin's attorney argued that the joint representation presented a conflict, for some of the same reasons argued on direct appeal, and that it constituted ineffective assistance of counsel. The trial judge denied the post-conviction petition, saying:

> The Court is very familiar with the case, and of course what the defendant is asking me to do is disregard his prior perjured testimony and to say now that he has seen the light, and he's in to tell the truth. I don't know whether he's telling the truth or not. I don't know whether he told his attorney Mr. Goldenhersh that or not. He was afforded a defense according to the defendant's own testimony on the stand under oath. There was no conflict in the defense between the defendant and his co-defendant. Motion will be denied.

Resp. App. Exh. C at 21-22.

Griffin's appeal of the denial of his post-conviction petition was decided by the Illinois Appellate Court on the same day as was his direct appeal. That court reversed the trial court and granted Griffin's post-conviction petition on grounds of ineffective assistance of counsel. *People v. Griffin*, 463 N.E.2d 1063 (Ill. App. 5 Dist. 1984). The court relied on the principle that "in some instances, however, the choice of treating co-defendants differently is more than a mere possibility; it is forced on counsel by the difference in evidence offered against co-defendants." *Id.* at 1071. The court pointed out that:

> In order to take full advantage of the inconsistencies in the identification of Griffin, Goldenhersh would have had to distinguish between the uncontradicted assertions that Smith killed the girl and shot Kellick and the uncertainties about the identity of the man in the bathroom who shot Sims and the man or men who shot Walker. As it was, he only pointed to the inconsistencies and ambiguities as matters going to the credibility of the State's witnesses. Counsel could not give Griffin the best possible defense under the

> circumstances because to do so would have been disloyal to Smith, his original client. Because of this conflict of loyalties, he remained silent when independent counsel would have spoken out on Griffin's behalf.

Id. at 1072. For these reasons the Appellate Court granted Griffin's petition.

On the State's appeal to the Illinois Supreme Court, however, the decision of the Appellate Court was reversed. *People v. Griffin*, 487 N.E.2d 599 (Ill. 1985). The Illinois Supreme Court emphasized that the Appellate Court was not in a position to judge the credibility of Griffin's testimony regarding what he had told Mr. Goldenhersh about whether he was present at the scene of the shooting. The Illinois Supreme Court also was unconvinced that Mr. Goldenhersh's failure to closely explore the discrepancies in the identification testimony of the various state witnesses was ineffective assistance. The Court said that "[b]ased on these discrepancies, trial counsel did attack the credibility of the witnesses. His attack, however, was probably somewhat deflected by the fact that the defendant was testifying to the joint alibi that he and Smith were at the tavern. . . . It would seem incongruous to permit a defendant to perjure himself and then benefit from that perjury by successfully contending that his attorney, because of the perjury, did not most effectively explore grounds for his advantage." *Id.* at 604.

B. Federal Habeas Corpus Proceedings

Griffin's federal petition for writ of habeas corpus continued to argue that he received ineffective assistance of counsel from Mr. Goldenhersh due to the joint representation. Mr. Goldenhersh was deposed in connection with the habeas corpus proceedings. The magistrate judge found that "[i]n his deposition, Marvin Goldenhersh stated that only facts relating to the alibi defense were given to him while preparing for trial." He also found that "Mr. Goldenhersh further stated that he never discussed the theory

of accountability with the petitioner and did not tell him that he would be found guilty if he admitted being at the scene." On this basis, the district court denied the habeas corpus petition. Resp. App. Exh. A at 11.

On appeal, however, this court noted apparent inconsistencies between the district court's factual findings and the record. In particular, we pointed out that Mr. Goldenhersh testified in his deposition that he did discuss accountability with Griffin and that he stated that "there was the possibility that [Griffin] could be found guilty on the basis of accountability." *Griffin v. Camp*, 40 F.3d 170, 174 (7th Cir. 1994). We also noted that "[a]lthough Goldenhersh unequivocally stated that Griffin only gave him one version of the events—the version supporting the alibi defense—Goldenhersh's other statements indicate that he had access to a significant amount of evidence which pointed to another potential defense." *Id.*

Finally, we pointed out that the district court neglected to explain "how the law, when applied to these facts, led to the conclusion that Griffin had effective assistance of counsel." *Id.* We thus remanded the case to the district court for clarification.

On remand, the district court reviewed the record and found that an actual conflict of interest existed. The district court relied on two grounds for this conclusion. First, the court acknowledged that Mr. Goldenhersh testified in his deposition that Griffin never told him facts which were at odds with the alibi defense. However, the court noted that the record shows that Mr. Goldenhersh was aware before trial of facts suggesting the availability of a viable innocent bystander defense. The district court also stated that "only Jimmy Smith would have benefited from an alibi defense," noting that "Jimmy Smith, as a convicted felon was unable to testify" so that "[i]n a joint trial, only [Griffin] was able to take the stand in their behalf." Finally, the court pointed out that the alibi defense provided the only way in which Mr. Goldenhersh could have represented both clients. Dist. Ct. Order at 12-14.

Based on these considerations, the district court found that a conflict of interest existed between Griffin and Smith such that joint representation of the two was precluded. The court also recognized that the record clearly showed that Griffin had never waived any conflict of interest between Smith and him with respect to their respective defenses. The district court thus granted Griffin's petition for a writ of habeas corpus.

IV. Analysis

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court set out the standard for a finding of ineffective assistance of counsel based on multiple representation. There, the Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. A mere possibility of a conflict is not sufficient to violate the Sixth Amendment. However, once a defendant has shown that an actual conflict exists, no showing of prejudice is required. *Id.* at 348-50. In general, trial courts are not required to inquire into the possibility of a conflict and "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* at 347.[5]

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[5] It is worth pointing out, however, that if the trial court "knows or reasonably should know that a particular conflict exists" the court is required to initiate an inquiry. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). The Federal Rules of Criminal Procedure, in fact, require that whenever there is joint representation "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation." Fed. R. Crim. P., Rule 44(c). In the current case the prosecution brought the potential for conflict of interest to the attention of the trial court. There is perhaps a question whether at that point the trial court was obligated to inquire further into the matter. Since the Petitioner does not raise this question, however, we pursue it no further.

The determination whether a particular case presents an actual, as opposed to a potential, conflict of interest is not always straightforward. The mere presentation of a "common defense" does not conclusively demonstrate that any conflict of interest was merely potential. "A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *United States ex rel. Gray v. Director, Dept. of Corrections*, 721 F.2d 586, 596-97 (7th Cir. 1983), quoting *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). Conversely, the mere fact that co-defendants abandon a pre-trial stance in which they accuse each other of a crime in favor of a common defense does not lead ineluctably to the conclusion that their attorney faced an actual conflict of interest. *United States v. Cirrincione*, 780 F.2d 620, 629-31 (7th Cir. 1985). When a defendant makes a purely tactical decision to abandon a defense which is adverse to that of a co-defendant, he or she cannot then claim to have been a victim of ineffective assistance of counsel. *United States ex rel. Cole v. Lane*, 752 F.2d 1210, 1220 (7th Cir. 1985).

Thus, in circumstances such as the present case, where a defendant has pursued a common defense rather than an alternative defense adverse to the interests of a co-defendant, a showing of ineffective assistance of counsel requires that the complaining defendant show "specific instances where [his] attorney could have, and would have, done something different if that attorney had represented only one defendant." *Cirrincione*, 780 F.2d at 630-31. However, these specific instances need not be taken solely from the conduct of the trial. Instances in which choices of strategy would have been made differently had there been separate representation may also demonstrate ineffective assistance of counsel. "The test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in making the choice of defenses the interests of the defendants were in conflict." *Gray*, 721 F.2d at 597.

Applying these standards to the present case, we find that the district court was correct in ruling that an actual conflict of interest existed in the joint representation of Griffin and Smith.

Mr. Goldenhersh was possessed of information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of Griffin and shifting the blame onto Jimmy Smith. Whether or not Mr. Goldenhersh was actually told by Griffin that he had been present at the scene of the shooting,[6] Mr. Goldenhersh did know that Griffin had

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[6] The district court did not make a specific determination whether Mr. Goldenhersh was informed by Griffin that he had been at the scene of the crime. Such a determination is not necessary to our resolution of this case, for we assume for purposes of this discussion that, contrary to Griffin's testimony, Mr. Goldenhersh was not told by Griffin that he had been present at the time of the shootings. We note, however, that Mr. Goldenhersh's deposition testimony as to what Griffin told him in this regard is not entirely consistent. While Mr. Goldenhersh insists that Griffin never presented him with facts which conflicted with the alibi story, he also stated at one point that "my recollection of what Griffin told me about the occurrence was that he and Smith were there, but by the time they got there, that the shootings had already occurred." Resp. App. Exh. F at 15. Later in the deposition, Mr. Goldenhersh backed away from this statement, saying that he was not sure where he had gotten the idea that Smith and Griffin had been present at the scene of the shootings. Similarly, Mr. Goldenhersh, at one point, stated that his discussion of accountability with Griffin was prompted by Griffin's questions concerning the effect of the statements he had made to Derango. *Id.* at 21-22. When pressed, however, Mr. Goldenhersh couldn't say for sure "whether [Griffin] talked in terms of this is what he told Derango or whether he talked in terms if this were his testimony." *Id.*

In general, and understandably after a ten year lapse of time, Mr. Goldenhersh's deposition testimony indicated considerable confusion in his recollection of events. For example, he stated that the motion to sever was primarily based on concerns with Jimmy Smith's criminal record. In fact, the record of the severance hearing clearly indicates that Mr. Goldenhersh was at least equally concerned with the potential effects of Griffin's damaging admissions on Smith's case.

stated earlier to Derango and to Officer Moore that he had been there and could identify Smith as a shooter. Mr. Goldenhersh had also received discovery from the prosecution which included police reports indicating that Kellick had identified Griffin as the man who shot Sims and reports describing the conflicting versions of Walker's dying declaration. Prior to trial, Mr. Goldenhersh received a memorandum from the prosecution purporting to describe the revised testimony which Robinson intended to give. Trial Tr. at 107. In her testimony, Robinson identified Griffin as one of the two men who arrived at the scene in the Cadillac. Trial Tr. at 226. Given all of this available information, we cannot accept the conclusion that Mr. Goldenhersh was unaware of the difficulties with the alibi defense and the possibility of an innocent bystander defense.

The question, then, is what Mr. Goldenhersh was obligated to do with this information in order to provide effective assistance of counsel. Of course, the mere fact that a defendant chooses one of two available defenses cannot establish ineffective assistance of counsel, even if the defendant makes a bad choice. However, counsel may be ineffective if the joint representation precludes an obvious and viable alternative defense when the common defense is so completely untenable. Failure to consider the possible defenses with a mind to the best interests of a client is particularly likely when the alternative to a common defense is helpful to one client but is highly detrimental to the other (as was the case here).

Here, in spite of all the information suggesting the likely untruth of Griffin's alibi and the near certainty that it would not be believed by a jury, there is no suggestion in the record that Mr. Goldenhersh pressed Griffin as to the validity of the alibi, discussed with him the possibility of a bystander defense or pointed out the comparative weakness of the State's case against him as opposed to the case against Smith. Even if Griffin did represent that the alibi story was true, an effective attorney would have discussed with Griffin the disadvantages of linking his for-

tunes to those of Smith, given the strength of the eyewitness identifications of Smith and Smith's extensive criminal history.[7] An attorney free to consider Griffin's singular interests would, particularly in light of Griffin's waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left Griffin with the task of refuting the evidence against Smith as well.

This case is thus distinguishable from *Cirrincione* and *Cole*. In *Cirrincione*, the defendant claimed that he refrained from testifying at his joint trial with his father because he feared that his testimony would hurt his father. The court, however, found that it was "not clear how [his] testimony . . . could have hurt [his father]" and that it was "highly unlikely that Tom refused to take the stand" to protect his father. Similarly, the court found little merit in the defendant's contention that he was damaged by his inability to cross-examine his father when there was "nothing in the record inculpatory of [the defendant] that was not already corroborated by other witnesses' testimony." *Cirrincione*, 780 F.2d at 631.

In *Cole*, the defendants never moved to sever the trial despite statements that each had given to police admitting that both were present at the scene of an armed robbery but accusing the other of having taken the money and carried the gun. At trial the defendants abandoned their mutual accusations and presented a common defense in which they attacked the credibility of prosecution witnesses and explained why they were in the area where the armed robbery occurred. *Cole*, 752 F.2d at 1220. The facts of *Cole* do not suggest that the decision to pursue a joint defense redounded to the detriment of one co-defen-

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[7] We note in this regard that the fact that a client tells an attorney he has an alibi does *not* require the attorney to present the alibi defense.

dant and to the advantage of the other. The two co-defendants were in apparently equivalent positions and seemingly made a joint decision to give up accusing each other and gain the advantages of a consistent defense. There is thus nothing about *Cole* which suggests that separate counsel would have done anything differently.[8]

The current case, however, is not one, like *Cirrincione*, in which co-defendants gambled on a common defense which was as likely to prove advantageous to one as to the other. Nor is it a case, like *Cole*, in which the avenues of inquiry closed off by the joint representation were of little consequence. In contrast to these cases, the record here suggests that both before and during the trial, Mr. Goldenhersh's choices were unacceptably constrained by the joint representation of Griffin and Smith and that these constraints worked to the unilateral disadvantage of Griffin.

The decision to present the alibi defense was, as the district court noted, clearly favorable for Smith's defense but likely detrimental for Griffin's. Without Griffin's alibi testimony, Smith did not have a leg to stand on in presenting a defense. He was unequivocally identified as having shot two of the victims and he had an extensive criminal record which effectively precluded him from testifying. Griffin, on the other hand, had the option of pursuing a defense based on the inconsistencies in the testimony iden-

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[8] *Cole* contains a statement that "in all of the cases where we have found an actual conflict of interest between codefendants who were jointly represented by the same defense counsel, the defendants did not abandon their defenses." *Cole*, 752 F.2d at 1220. This statement is incorrect, ignoring as it does the finding of actual conflict of interest in *Gray*, in which the defendant abandoned an adversarial defense in favor of a common defense with a co-defendant whom her attorney jointly represented. *Gray*, 721 F.2d at 597. In any event, the statement in *Cole* was merely one of statistics and not one of principle.

tifying him as a shooter.[9] These inconsistencies included: (i) the conflict between Kellick's testimony that Griffin was already in the apartment when he and Sims arrived and Robinson's testimony that Griffin was one of the two men who followed Kellick and Sims in; (ii) the conflict between Officer Settles' report that Walker's dying declaration was that "Lee" shot him and Trooper Rice's account that Walker said that "Lee's friend" shot him; and (iii) the implied conflict between Kellick's identification of Griffin as the one man already in the apartment and Walker's statement, attested to by all three witnesses, that Jimmy Smith killed his girlfriend, Christi Smith. (This last statement presents an implied conflict because Walker also said that Christi Smith was dead when he arrived at the apartment. Thus Walker's identification of Jimmy Smith as her killer was likely based on Jimmy's having been present when Walker arrived. Robinson, however, testified that Griffin and another man had left the apartment by the time Walker arrived and that they went back in only *after* Walker.)

In the face of the uncontradicted evidence placing Smith at the scene during the shootings, Griffin's testifying to an alibi which involved Smith could do nothing but damage his own case. While a defense based on simply raising doubts about the credibility of the testimony implicating Griffin in the shootings might well have been unsuccessful, the joint alibi defense was nearly as weak as no defense

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[9] The dissent contends that by emphasizing the strength of the case against Smith we "fail[ ] to concretely evaluate the relative strengths of the two potential defenses that were available to Griffin." Dissent at 25. There are two reasons for focusing on the strength of the case against Smith. First, as the dissent acknowledges, the presentation of the joint alibi defense inextricably bound Griffin's defense to that of Smith's. Griffin's alibi defense could be no stronger than Smith's. Second, the power of the case against Smith meant that the joint alibi was essentially the only defense available to Smith. This circumstance deepened the conflict inherent in the joint representation.

at all.[10] There was only the slimmest chance, if any, that a jury would believe the alibi in the face of the consistent eyewitness testimony placing Griffin and Smith at the scene of the murders. On the other hand, an attorney representing only Griffin could have impeached the identifications of Griffin as a shooter by exploiting obvious inconsistencies in testimony. The joint representation prevented Mr. Goldenhersh from exploiting the disparity in strength of the respective prosecution cases against Griffin and Smith.

It is true that the innocent bystander defense was not promising. It is often the unenviable job of defense counsel to choose among unpromising defenses. However, when an actual conflict of interest due to joint representation constrains an attorney to choose the hopeless in favor of the unpromising, the defendant has received ineffective assistance of counsel.

The disadvantage to Griffin which the joint alibi defense unavoidably imposed was exacerbated by Mr. Goldenhersh's conduct of the trial. The extent to which the scapegoat argument relating to Griffin's brother's killing could have been helpful even to Smith is highly questionable. In any event, it is most unlikely that any attorney representing only Griffin would have pursued such an unpromising tack. An unconflicted attorney would not have had to resort to the suggestion that the victims implicated Griffin in order to frame him because they were responsible for his brother's death a few weeks earlier. Such a flimsy theory may have been the only thing available to Smith given the consistent testimony identifying him as a shooter, but no effective attorney representing Griffin alone would have resorted to it.

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[10] The dissent agrees "that the evidence at trial did not conclusively demonstrate that Griffin was a shooter." What the dissent neglects to note is that the evidence at trial *did* conclusively demonstrate, to all intents and purposes, that Griffin and Smith were at the scene at the time of the shootings.

Finally, Mr. Goldenhersh was apparently so confused by his joint representation of the two defendants that he argued in closing that Walker, in his dying declaration, "told them . . . that Lee Griffin shot my girl friend." Trial Tr. at 488. In fact, the three witnesses to Walker's dying declaration unanimously reported that Walker said that it was *Smith* who shot his girlfriend, even though they differed as to what Walker said about his own attacker. Mr. Goldenhersh's statement was not a mere slip of the tongue. Mr. Goldenhersh argued that Walker's identification was unreliable by suggesting that he could not have known who shot his girlfriend since she was already dead when he arrived. In pursuing this effort, Mr. Goldenhersh suggested that "it could be argued that because Lee Griffin allegedly then shot him, that he jumped to the conclusion that he also shot his girl friend." *Id.* Thus, Mr. Goldenhersh not only told the jury incorrectly that Griffin was accused of shooting Christi Smith. But he also accepted as a premise for his argument that Walker had said that Griffin had shot him. In fact, of course, the witnesses to the declaration disagreed as to whether Walker implicated Griffin or "Lee's friend." Such a prejudicial confusion of the evidence would not have occurred if Griffin had had his own representation.

In conclusion, the record in this case undoubtedly provides "specific instances where [Griffin's attorney] could have, and would have, done something different if that attorney had represented only one defendant." *Cirrincione*, 780 F.2d at 630-31. The record therefore supports the district court's conclusion that an actual conflict of interest infected the joint representation of Griffin and Jimmy Smith. Lastly, the district court found, and we agree, that the record discloses no waiver of this conflict on Griffin's part. In fact, Mr. Goldenhersh never discussed the potential for conflict of interest with Griffin. Such an unwaived actual conflict of interest is a violation of the Sixth Amendment and requires the granting of Griffin's Petition for Writ of Habeas Corpus.

Therefore, we affirm the judgment of the district court. The writ shall issue, thereby releasing Griffin from custody, unless the State of Illinois elects to retry him within one hundred twenty (120) days from the issuance of this Court's final mandate.

AFFIRMED.

FLAUM, *Circuit Judge*, dissenting. The Supreme Court has held that in order to establish ineffective assistance of counsel based on multiple representation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is not enough for the defendant to prove the existence of a possible or potential conflict of interest. *Id.* This court has held that where a defendant pursues a common defense rather than one adverse to his co-defendant, the defendant, to establish more than merely a potential conflict, "must show specific instances where [his] attorney could have, and *would have*, done something different if that attorney had represented only [the] defendant." *United States v. Cirrincione*, 780 F.2d 620, 630-31 (7th Cir. 1985) (emphasis added). The majority applies these standards and decides that attorney Marvin Goldenhersh's representation of Lee Griffin violated the Sixth Amendment. I conclude, however, that Griffin has failed to demonstrate anything more than a possible conflict and therefore respectfully dissent from the majority's decision.

The relevant issue in this case boils down to whether an attorney representing Griffin alone would have presented the innocent bystander defense instead of the alibi

defense at trial. Much of the majority's analysis, however, focuses not on the choice of defenses but rather on the pre-trial discussions that Goldenhersh had with Griffin regarding his defense. Relying completely on the absence of evidence in the record, the majority concludes that no consideration or discussion of possible defenses occurred. Yet it is the defendant's burden to prove that his attorney had an actual conflict of interest in advising him. *See, e.g., Cuyler*, 446 U.S. at 348; *Cirrincione*, 780 F.2d at 630-31 n.4. Accordingly, "[t]he mere possibility of divided loyalties is insufficient to sustain the defendant's burden." *Id.* The district court did not find that Goldenhersh failed to examine with Griffin the weaknesses of the alibi defense and the possibility of presenting an innocent bystander defense. The record on this point is indeed inconclusive.[1] I fear the majority treads on dangerous ground by inferring the absence of specific discussions from an indeterminate record developed over ten years after the fact.

The record does make clear that Griffin told his previous attorney, Ralph Derango, that he was an innocent bystander, that Derango attempted to negotiate a agreement with the police where Griffin would testify against co-defendant Jimmy Smith, and that the police weren't buying Griffin's story. Confronted with this situation, Griffin's family decided to retain Goldenhersh and discharge Derango. And, although the exact nature of the conversations that took place between Griffin and Goldenhersh regarding Griffin's defense is unclear, we do know that, at trial, Goldenhersh presented the alibi defense, and Griffin testified under oath that he and Smith were at a

[1] As the majority points out, Goldenhersh's memory was less than clear regarding the extent to which Goldenhersh discussed the innocent bystander defense with Griffin. Yet Griffin's petition for habeas relief alleged that Goldenhersh erroneously advised him that the innocent bystander defense would fail, not that Goldenhersh neglected to discuss the defense with him. Moreover, the record is silent as to whether Goldenhersh explored with Griffin the dangers of linking his defense to Jimmy Smith's.

tavern playing cards when the murders occurred. Thus, the facts of this case are analogous to those in *United States ex rel. Cole v. Lane*, 752 F.2d 1210 (7th Cir. 1985), where the habeas petitioner abandoned a defense of accusing his co-defendant and testified under oath that neither he nor his co-defendant was involved in the crime. In *Cole*, we stated:

> [W]hen Cole was presented with an opportunity to accuse Cade of committing the armed robbery, Cole denied under oath telling the arresting officers that Cade had committed the crime. It is logical to assume from the record in this case, rather than demonstrating an actual conflict of interest, that in all probability the defendants agreed prior to trial upon a trial strategy of neither defendant testifying against the other. Because there is no evidence in the record that Cole ever pursued the defense of accusing Cade of committing the armed robbery and, to the contrary, disclaimed the defense under oath, we hold that Cole abandoned the defense of accusing Cade. Decisions to pursue or abandon defenses are tactical choices of trial strategy. . . . Since the decision to abandon the defense of accusing Cade was an obvious strategical and tactical decision, it may not be reviewed by this court on appeal.

752 F.2d at 1220. Where a defendant testifies under oath to the truth of a particular defense, we therefore presume that the defendant made a tactical decision to present the defense consistent with his testimony. Such a tactical decision cannot provide the foundation for a claim of actual conflict of interest. *Id.* Of course, the defendant can overcome this presumption of trial strategy by showing that an unconflicted counsel would have pursued a different course of action. *See, e.g., Cirrincione*, 780 F.2d at 631.

The evidence against Griffin left Goldenhersh with two options: he could have presented the alibi defense or the innocent bystander defense. The majority attempts to distinguish *Cole* by concluding that an unconflicted counsel representing Griffin would have presented a defense based

on inconsistencies in the testimony identifying him as a shooter. Yet the majority fails to concretely evaluate the relative strengths of the two potential defenses that were available to Griffin. Only by comparing the strengths and weaknesses of the two defenses can we decide whether an unconflicted counsel would have presented the innocent bystander defense rather than the alibi defense.[2] Certainly, the evidence supporting the alibi defense was weak at best. The alibi was only partially corroborated by Priscilla Smith, and extensive evidence placed both Griffin and Jimmy Smith at the scene of the crime. Furthermore, the defense had the disadvantage of connecting Griffin's story to that of Jimmy Smith, who was consistently identified by witnesses as a shooter. This is not to say that the alibi defense lacked any advantages. We have noted that "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Cole*, 752 F.2d at 1220 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978)). Although it may have been unlikely that Jimmy Smith would have testified against Griffin if they had been afforded separate trials, by presenting the alibi defense Goldenhersh eliminated this possibility entirely.

The majority posits that Griffin could have pursued a defense based on the inconsistencies identifying him as a shooter. I agree with the majority's assessment that the evidence at trial did not conclusively demonstrate that Griffin was a shooter. Yet the prosecution's case against Griffin was broader, implicating him as at least an accomplice to the murders. Both Robinson and Kellick clearly placed Griffin at the scene of the crime in a group of

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[2] Much of the majority's opinion focuses on the relative strength of the cases against Griffin and Jimmy Smith. The fact that the case against Jimmy Smith was stronger than that against Griffin is relevant to evaluating the risks of linking Griffin's defense to that of Smith. It does not, however, directly determine the ultimate issue of whether an unconflicted counsel would have presented the innocent bystander defense.

three men who committed the murders. To respond to this evidence, Goldenhersh could have presented the innocent bystander defense—Griffin could have taken the stand and testified that, although he was at the scene of the crime, he had nothing to do with the murders. Accomplice liability in Illinois is broad, however, and this defense would not have provided much hope for Griffin. Under Illinois law, a person is legally accountable for the conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2. Although a person's mere presence at the scene of a crime is insufficient to impose criminal liability, active participation in a crime is not necessary for liability to be based on a theory of accountability. *People v. Davis*, 626 N.E.2d 1187, 1202 (Ill. App. Ct. 1993). The Illinois Supreme Court has stated:

> If the proof shows that a person was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime. Stated differently, circumstances may show there is a common design to do an unlawful act to which all assent, and whatever is done in furtherance of the design is the act of all, making each person guilty of the crime.

People v. Morgan, 364 N.E.2d 56, 60 (Ill. 1977) (quoting *People v. Washington*, 186 N.E.2d 259, 261 (Ill. 1962)). Other factors that Illinois courts have used to determine whether a defendant can be liable on an accountability theory include his association with the co-defendants (e.g., common arrival at the scene), flight from the scene, continued association with the perpetrators after the criminal act, and failure to report the incident. *See Morgan*, 364

N.E.2d at 60; *Davis*, 626 N.E.2d at 1202; *People v. Jones*, 299 N.E. 2d 77 (Ill. App. Ct. 1973) (holding defendant accountable for murder committed by co-defendant based on evidence that they arrived at scene together and fled together after murder).

In light of the law of accountability and the evidence against Griffin, the innocent bystander defense was far from promising. Robinson testified that Griffin and another man entered the apartment during the first set of murders, then drove away in Griffin's car, and returned to the apartment together immediately before Walker was murdered. These facts, combined with no evidence (apart from Griffin's presumed testimony) showing that Griffin attempted to disassociate himself from the crime or call the police, would have been severely damaging to a claim by Griffin that he was merely an innocent bystander. *See, e.g.*, *Morgan*, 364 N.E.2d at 60; *Davis*, 626 N.E.2d at 1202; *Jones*, 299 N.E. 2d 77. Moreover, the testimony identifying Griffin as one of the shooters would only have increased the likelihood of the jury finding him guilty of murder. *See, e.g.*, *Davis*, 626 N.E.2d at 1202 (finding some evidence that defendant may have actually shot at victim supported guilty verdict based on accountability theory).

Comparing the likelihood of success of the two defenses that were available to Goldenhersh, I cannot conclude that an unconflicted counsel would have presented the innocent bystander defense. Given the evidence in this case, Griffin was fighting an uphill, and ultimately losing, battle. Although the probability of a successful alibi defense appears close to nil, the likelihood of a successful innocent bystander defense was not significantly greater.[3] Griffin has

[3] The majority distinguishes *Cole* as a case in which "the avenues of inquiry closed off by the joint representation were of little consequence." Maj. Op. at 18. Yet there is no reason to believe that Griffin's innocent bystander defense would have had a better chance of success than the potential defense that was foreclosed in *Cole*.

therefore failed to demonstrate specific instances where an unconflicted counsel representing him would have acted differently.[4] Griffin cannot sustain his burden of demonstrating an actual conflict by showing that it was possible that Goldenhersh's choice of the alibi defense was a product of divided loyalties. *See, e.g., Cirrincione*, 780 F.2d at 630-31 n.4. For that reason, I have determined that Griffin's Petition for Writ of Habeas Corpus should not be granted.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] To support its finding of conflict, the majority also points to Goldenhersh's use of the scapegoat argument and his confusion of the defendants at trial. Although the scapegoat argument may have been unhelpful, and even prejudicial, to the defendants, it appears to have been the result of bad trial strategy rather than any conflict of interest. Given the weakness of both of Griffin's potential defenses, Goldenhersh very likely would have made the same argument regardless of the defense chosen. Similarly, Goldenhersh's confusion of the two defendants and the evidence against each of them may exhibit incompetence, but it does not demonstrate a conflict of interest. Griffin has not made a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which provides relief for defendants who can demonstrate that their counsel's deficient performance prejudiced their defense.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1996

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

LEE O. GRIFFIN,

Petitioner-Appellee,

No. 95-2330 v.

RICHARD D. McVICAR, Warden,
Shawnee Correctional Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 91 C 228—Gerald E. Cohn, Magistrate Judge.

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *en banc* filed by the Appellant. No judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

In addition, this court's opinion of May 21, 1996 is hereby amended by inserting, after "Petition for Writ of Habeas Corpus," in the last line on page 21 of the slip opinion, the following footnote 11:

> The State has not argued in its petition for rehearing that this case is affected by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (the Antiterrorism Act), which amends the procedures and standards applicable to petitions for writs of habeas corpus. In *Lindh v. Murphy, No. 95-3608*, issued September 12, 1996, this court *en banc* considered and decided a number of issues involving the application of the Antiterrorism Act. Among other things, we decided that a state may waive the benefits of the amended 28 U.S.C. §2254(d) (slip op. at 13). That being the case here, we need not further consider the application of the Antiterrorism Act.

App. 31

[Dated May 3, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LEE OTIS GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil No. 91-228/6Bc
	)	
	)	
RONALD HAWS, WARDEN,	)	
	)	
Respondent.	)	

ORDER

Pursuant to 28 U.S.C. 636(c), the parties have consented to final entry of judgment by a United States Magistrate Judge. A Notice of Referral was entered by the Clerk of this Court on January 23, 1992, pursuant to an Order of Chief Judge William D. Stiehl.

Petitioner, an inmate at the Centralia Correctional Center, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 on March 25, 1991.

This matter is before the Court on Remand from the Seventh Circuit Court of Appeals. In response to the Remand Order, the parties have briefed the issue. A hearing was held on this matter on April 7, 1995.

Petitioner, Lee Otis Griffin, is currently incarcerated at the Shawnee Correctional Center serving three concurrent 40 year terms for murder and one 30 year concurrent sentence for armed violence. The petitioner was con-

victed of the charges following a jury trial in the Circuit Court of St. Clair County, Illinois, on June 4, 1981.

After his conviction, the petitioner and his co-defendant filed a direct appeal raising the following grounds for relief: (1) that the trial court erred by admitting black and white photographs of the murder victims taken at the morgue; (2) that the trial court erred in sustaining objections to defense counsel's questioning about a prosecution witness' "rap sheet"; (3) that the trial court improperly admitted hearsay testimony regarding statement's made by murder victim as he lay injured in supermarket; (4) that defendant was given ineffective assistance of counsel since dual representation of defendants foreclosed an antagonistic defense of the petitioner; and (5) that the failure of defense counsel to object to improper police procedure constituted ineffective assistance of counsel. After briefing and argument, the appellate court affirmed the conviction. *People v. Griffin*, 463 N.E.2d 1055 (5th Dist. 1983) (J. Starnes, dissenting). On further review, the Illinois Supreme Court affirmed the decision of the appellate court. *People v. Griffin*, 487 N.E.2d 599 (1985).

Petitioner next filed a series of post-conviction petitions. On March 18, 1992, petitioner filed a post-conviction petition alleging that Charles Kellick, the state's key witness, had perjured himself at trial. On August 4, 1982, a subsequent petition alleging ineffective assistance of trial counsel was filed. These two petitions were consolidated and the appellate court, with Justice Welch dissenting, reversed the conviction and remanded the cause for a new trial. *People v. Griffin*, 463 N.E.2d 1063 (5th Dist. 1984). In remanding the case, the appellate court found that trial counsel's representation had been

ineffective due to a failure to request a severance on grounds of conflict of interest and in putting on a defense which was injurious to the defendant when defense counsel was aware of another plausible defense. On December 20, 1985, the Illinois Supreme Court reversed the appellate court's decision finding that Marvin Goldenhersh, petitioner's trial counsel, had not labored under a conflict of interest. *People v. Griffin*, 487 N.E.2d 599 (1985).

Petitioner next filed a *pro se* petition for post-conviction relief alleging that 1) Charles Kellick knowingly falsified material testimony at trial; 2) that the State knowingly used this falsified testimony; 3) that the State suppressed evidence of the fact that Charles Kellick was unable to positively identify Mr. Griffin at the scene; and 4) that the State induced Scott Kellick to distort facts concerning testimony favorable to the defendant at the post-conviction hearing. This petition was amended by counsel on August 10, 1987, and alleged that 1) there was an insufficient number of black jurors on the jury venire and that the court and state systematically excluded black jurors by peremptory challenges or for cause; 2) that the number of jurors from the defendant's race was substantially under-represented on the venire from which the defendant's jury was selected; 3) that the East St. Louis Police Department knew of and assisted in Charles Ray Kellick's giving perjured testimony; 4) that the police wrongly suggested to Kellick that Griffin was involved in the crime; and 5) that the State violated its agreement with the defendant when it released witnesses prematurely, thereby making the witnesses unavailable to the defense. On January 8, 1988, this petition was again amended to additionally allege: 1) that the defendant was denied effective assistance of counsel

for failure to raise on appeal the issue of exclusion of blacks from the defendant's jury; 2) that the State had induced Scott Kellick to distort facts that were material to the defendant's post-conviction petition and furthermore induced Scott Kellick to recant his post-trial affidavit; and 3) that during the trial, the jury heard evidence that was not part of the record. This last petition was denied by the trial court on March 4, 1988, in an order which dismissed all allegations except the claim of incompetency of counsel. On that issue, the trial court found that appellate counsel had not been incompetent.

Petitioner, a self-admitted perjurer, has now filed the instant federal habeas action alleging that he was denied his Sixth Amendment right to the effective assistance of counsel because a conflict of interest existed between petitioner and his codefendant. Petitioner alleges that this conflict adversely affected defense counsel's performance because it limited his ability to properly cross-examine witnesses. Furthermore, the conflict of interest affected trial counsel who chose to proceed with a united alibi defense which counsel knew to be perjured and which ensured petitioner's conviction.

FACTUAL BACKGROUND

In its opinion affirming the conviction of the petitioner, the Illinois Supreme Court set forth the factual summary of the facts presented at trial:

> On February 5, 1981, Charles Sims, Christi Smith and Ronald Walker were fatally shot and Charles Kellick was severely wounded in an East St. Louis apartment. Kellick, the survivor, testified that on February 5, 1981, he and two friends, Charles Sims

and Velva Robinson, drove in his truck to an apartment occupied by Christi Smith and Ronald Walker. Sims first entered the building alone and returned to the truck saying that he heard Christi Smith crying. Sims again entered the building, this time accompanied by Kellick. Kellick stated that he and Sims entered the unlocked apartment and discovered Christi Smith in the bathroom with the defendant. As Sims stepped into the bathroom, the defendant shot him. Kellick turned and ran, and on his way out he brushed past two other men. (He did not identify these two men, but from the record they are presumed to have been Jimmy Lee Smith, the codefendant here and Will Hudson, a third man who was never apprehended.) Before he reached the front door, he was shot in the back of the head. He did not know who shot him. While he lay on the floor, Jimmy Smith shot him in the face. Kellick feigned death until the men left, at which time he hid in a compartment under the stairway. A police officer testified that when he questioned Kellick at the hospital Kellick said that he did not know who had done the shootings. Kellick testified that he did not remember this incident. Five days later he identified Griffin in a video lineup. He said that he had seen Griffin on two prior occasions and Smith on one occasion. Kellick said that he learned later that Christi Smith's apartment was considered to be a 'dope house.' Kellick testified that there was a pending criminal charge of truck theft against him and that the case was set to be heard subsequent to his testimony at the defendant's trial. He stated that he was aware of no agreement with the State as to the pending case regarding his cooperation with the prosecution and that he had not discussed the matter of an agreement with his attorney.

Velma Robinson testified that at 5 p.m. on February 5, 1981, she accompanied Kellick and Sims to the apartment building. Upon arriving, Robinson observed a red and white Cadillac pull behind their truck. Immediately after Kellick and Sims entered the building she saw two men leave the Cadillac and follow Kellick and Sims into the building. She identified the defendant as one of the two men. 'A few seconds' after the two men entered the building, she heard a shot. Minutes later, the same two men left the building. They reentered the Cadillac, pulled in front of Kellick's truck, waited five minutes, and then drove away. Five minutes later, Robinson observed Ron Walker enter the building. He was followed into the building by the two men from the Cadillac. Minutes later, she heard another shot. At this time Robinson drove off in Kellick's truck and reported the incidents to the police.

Ron Walker suffered five gun shot wounds but managed to make his way to a nearby grocery store. Just before he died he told several witnesses of the shooting. (His statements were admitted as a dying declaration over defense objection.) Lionel Settles, an East St. Louis police officer, was working that evening as a security guard at the grocery store. He testified that Ron Walker ran into the store bleeding heavily from bullet wounds. According to Settles, Walker said that when he entered his apartment, he found two dead persons, a man and a woman, on the floor. The woman was his girlfriend, Christi Smith. Settles said that Walker stated a man named 'Lee' had shot him, and he identified Lee as the owner of a furniture store in East St. Louis. A man called 'Rush City Jimmy' had shot his girlfriend, Walker said.

Darrell Rice, an Illinois State Trooper who was shopping at the store that evening, was conversing with Settles at the time that Walker entered the store. According to Rice, Walker stated that Lee's friend had shot him, and that 'Rush City Jimmy' had shot his girlfriend.

David Winchester, an assistant manager of the store, was also a witness to a portion of Walker's statement. He said that he heard Walker talk about 'a guy that ran a furniture store.' Winchester didn't hear Walker say who shot him, but he heard him say 'Rush City Jimmy' had shot his girlfriend.

Based on Walker's statement, police began a search for the defendant. That evening an officer on patrol observed him leaving a liquor store. He said that the defendant stepped back into the store and emerged a few minutes later wearing a different hat. The defendant and woman companion entered a station wagon and made a U-turn. As the patrol car moved to block the U-turn, Griffin drove around the police car into a vacant lot. The officer left his car and walked toward the defendant, at which time he turned off the motor. Officer Hendricks testified that he believed that the defendant had attempted to evade him. Griffin was placed under arrest and taken to the police station. Jimmy Lee Smith was arrested several days later. The defendant's white and red Cadillac was found abandoned in a wooded area of East St. Louis.

At the grand jury hearing, detective sergeant L.C. Moore, of the East St. Louis police department, who was in charge of the investigation of the murders, was a witness. He testified that at the police station following his arrest the defendant 'grabbed' a phone and was overheard saying 'get rid of the car; he's on to it, report it stolen.' The witness also testified that

when arrested the defendant told an officer he didn't do it, and when Moore served a warrant on the defendant in jail he stated that "it wasn't his idea to kill anyone." Moore also stated to the grand jury that "Jimmy Lee Smith doesn't believe in going back to jail"; that he was the type who would "leave no witnesses."

The defendant testified at trial that he operated a family-owned furniture store in East St. Louis and that he was the owner of a red and white Cadillac. He testified that he and Jimmy Lee Smith were at a tavern playing cards from 5 to 7 p.m. when the shootings took place. He said that although his Cadillac was in operating order, he did not use it that afternoon of [sic] evening. He said that morning he went six blocks by bus to borrow his sister-in-law's Ford Maverick and used it that day. He admitted having called his wife from the police station and having told her to report his Cadillac stolen. He testified that he had told her that only after she told him that their car was not at the furniture store. Griffin's codefendant, Jimmy Smith, did not testify at their joint trial. *Griffin III*, 487 N.E.2d at 600-601.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment requires that criminal defendants receive effective assistance of counsel at all stages of the proceedings against them. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.); *cert. denied,* 479 U.S. 937 (1986). *Strickland* requires that a defendant alleging ineffective assistance of counsel demonstrate [sic] that 1) counsel's performance fell outside the "wide range of professionally competent assistance" and, 2) a reasonable probability

exists that counsel's errors changed the outcome of the proceeding. *Strickland,* 466 U.S. at 690, 694. Assistance free from conflicts of interest is implicit in the concept of effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

"Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas,* 435 U.S. 475, 482 (1978). Many times "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurther, J. dissenting). When joint representation is not objected to at trial, the habeas petitioner must show: 1) that petitioner and another defendant were jointly represented by counsel; 2) that there was an actual conflict of interest between the co-defendants; and 3) the alleged conflict of interests affected the adequacy of legal representation afforded the defendants. *Dently v. Lane*, 665 F.2d 112, 116 (7th Cir. 1981).

The Sixth Amendment guarantees a defendant in a criminal trial the right to conflict free representation. *Cuyler v. Sullivan*, 446 U.S. at 335. See, *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985). A conflict of interest exists, "whenever a defendant stands to gain significantly by counsel's adducing probative evidence or advancing plausible arguments that are damaging to the cause of the co-defendant who [sic] counsel is also representing." *Gray v. Lane*, 721 F.2d 586, 596-97 (7th Cir. 1983), *cert. denied*, 466 U.S. 909 (1984), quoting, *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975); *Zembroski v. DeRobertis*, 598 F. Supp. 914, 921

(N.D. Ill. 1984). An actual conflict of interest can be determined only after examination of specific instances in the record. *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985). Actual conflict is an actual divergence of interests on the part of the defendants such that pursuing the interest of one would be antagonistic to another. *Zembroski v. DeRobertis*, 598 F. Supp. at 920. Where two or more defendants have inconsistent stories relating to the crime charged, joint representation is impermissible. *Williams v. Franzen*, 687 F.2d 944 (7th Cir. 1982).

This case is troubling to the Court and suggests that a per se ban against multiple representation might be in order. Since the petitioner has admitted committing perjury during the pendency of this matter, the Court is extremely hesitant to allow him to benefit from his wrongdoing. However, questions exist concerning trial counsel's representation of the petitioner at trial.

At the time of petitioner's arrest, it appears that he had two defenses available to him. One, the innocent by-stander defense and, two, an alibi defense. On his arrest, petitioner began to explore the innocent by-stander defense with his initial attorney, Ralph Durango. Mr. Durango contacted the local police and attempted to negotiate on behalf of his client, making certain representations as to petitioner's presence at the crime scene and his ability to identify the shooter. This position appears justified because the evidence did indicate the petitioner's presence at the crime scene. However, these negotiations were not fruitful and Mr. Durango was discharged as counsel in favor of Marvin Goldenhersh.

At the time Mr. Goldenhersh was retained to represent the petitioner, he was already representing Rush City

Jimmy Smith. Rush City Jimmy was a convicted felon with a lengthy criminal history, as opposed to the plaintiff, who did not have a criminal history. This arrangement would be untenable should the petitioner choose to pursue an innocent by-stander defense.

During his deposition, Marvin Goldenhersh insisted that he proceeded on the alibi defense at the petitioner's insistence and that they never discussed an accountability theory of defense. This assertion is contradicted by the petitioner and possibly by the pre-trial record. Prior to the trial, Mr. Goldenhersh filed a Motion to Sever the trials of his two defendants. Such motions are clearly indicated when one defendant has a defense antagonistic to another defendant. In addition, an innocent by-stander defense fits with the facts known prior to trial. Petitioner apparently made several admissions against interest which put him at the scene, witnesses, as well as victims identified him as being present. These facts, coupled with the plea negotiations Ralph Durango had pursued on petitioner's behalf indicate that petitioner had a viable alternate defense available.

The Court must consider which defendant would have benefitted by presenting the alibi defense. Jimmy Smith, as a convicted felon, was unable to testify. It is clear, only Jimmy Smith would have benefitted from an alibi defense. In joint trial, only the petitioner was able to take the stand in their behalf to present the alibi defense. Marvin Goldenhersh had two clients with differing interests. Only by presenting an alibi defense could counsel have represented both clients. The existence of an innocent by-stander defense for the petitioner made his position antagonistic to Rush City Jimmy's. Finally, the

record is clear that the petitioner never waived the conflict inherent in the dual representation.

Based upon a review of the record, the Court finds that a conflict of interest existed between defendants Lee Otis Griffin and Rush City Jimmy Smith. Since a conflict existed between these two defendants, joint representation of the defendants was precluded. Therefore, the joint representation of these clients by Marvin Goldenhersh rose to the level of ineffective assistance of counsel to petitioner, Lee Otis Griffin.

Accordingly, for the above-stated reasons, IT IS THE ORDER of this COURT that petitioner's Petition for Writ of Habeas Corpus is hereby GRANTED and respondent is directed to either release the petitioner or retry him within ninety (90) days.

Dated this 3rd day of May, 1995.

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GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE